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No. 93-45

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NATIONAL INTERFAITH CABLE COALITION, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

Appeal from the United States District Court
for the District Of Columbia

MOTION TO AFFIRM OF INTERVENORS ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, PUBLIC BROADCASTING SERVICE, AND CORPORATION FOR PUBLIC BROADCASTING

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QUESTION PRESENTED

Whether Congress, consistent with the First Amendment, may require cable operators to carry a limited number of noncommercial educational television stations in order to redress the severe competitive imbalances that exist in the video marketplace and preserve the institution of local public broadcasting.

RULE 29.1 LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Rule 29.1, the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting, Inc., through undersigned counsel, hereby certify that they have no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public.

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Appellees, the Association of America's Public Television Stations, Public Broadcasting Service, and Corporation for Public Broadcasting (collectively "the public broadcasters"), who were granted leave to intervene as defendants below, hereby move to affirm the judgment of the three-judge district court that Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 535 (1992) ("1992 Cable Act") does not violate the First Amendment. Section 5 requires cable operators to carry,

with certain important limitations, the signals of noncommercial educational television stations. Section 4 of the 1992 Cable Act, which appellants also challenge, enacts must carry requirements with respect to commercial television stations.

Appellants apparently challenge Sections 4 and 5 under both the Speech and Press Clause and the Establishment and Free Exercise Clause of the First Amendment. With respect to the Speech and Press Clause claims directed at Section 5, the public broadcasters incorporate by reference their Motion To Affirm filed this day in *Turner Broadcasting System, Inc., et al.* v. *Federal Communications Commission, et al.*, No. 93-44 (S. Ct.).[1/] The public broadcasters further submit that appellants' Establishment and Free Exercise Clause claims do not lie against Section 5.

Appellants are cable programmers that produce religious programming for sale to cable operators. Their Religion Clause claims, which were rejected by the district court below, are based on the premise that the must carry provisions of the Cable Act will require cable operators to carry the programming of local religious television stations, thereby reducing the channels available for (and the incentive of cable operators to purchase) appellants' programming. As a result, appellants argue, the must carry provisions violate both the Establishment Clause, by granting "preferential treatment" to local religious television stations, and the Free Exercise Clause, by impeding appellants from reaching their audience and delivering their religious message to viewers. *See* Joint Juris. Statement at 26-28.

[1/] The public broadcasters' Motion To Affirm in *Turner* also contains a detailed Statement that describes the special role of public television in the nation's telecommunications infrastructure, the nature of the cable industry, the history and text of Section 5 of the Cable Act, and the proceedings in the district court below.

With respect to Section 5, however, the premise of appellants' argument is wholly unfounded. By statutory definition, a television station must be qualified to receive grants from the Corporation for Public Broadcasting in order to invoke must carry rights under Section 5. *See* 47 U.S.C. § 535(l)((1)(A)(ii).[2] However, the Corporation's funding criteria prohibit grants for programming "designed to further the principles of religious philosophies." Corporation for Public Broadcasting, Eligibility Criteria for Television Community Service Grants ¶ 7(b) (Aug. 1992). Thus, local religious television stations cannot obtain carriage on cable systems pursuant to Section 5. Indeed, even appellants appear to concede that the only must carry requirements applicable to religious television stations are those contained in Section 4. *See* Joint Juris. Statement at 16 n.9.

In sum, appellants' Religion Clause claims simply do not lie against Section 5. Accordingly, the district court's denial of appellants' Religion Clause challenge to Section 5 should be affirmed.[3]

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[2] A television station that is "owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes" can also invoke must carry rights under Section 5. § 5(l)(1)(B). As the terms of this provision make clear, however, a local religious broadcaster would not qualify for must carry rights under this part of Section 5.

[3] Even if appellants' Religion Clause claims did lie against Section 5, the district court's decision should nonetheless be affirmed on the merits. As content-neutral economic regulation that imposes only incidental burdens on appellants' programming, Section 5 clearly passes the Establishment Clause standard set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and the Free Exercise Clause standard set forth in *Employment Div.* v. *Smith*, 494 U.S. 872 (1990).

CONCLUSION

For the reasons stated above, and in the public broadcasters' Motion To Affirm filed in *Turner*, the Court should affirm the district court's judgment upholding the constitutionality of Section 5.

Respectfully submitted,

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